

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 564 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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AIYUBKHAN GULAMDASTGIR PATHAN

Versus

POLICE COMMISSIONER

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Appearance:

MR RC KODEKAR for Petitioner

MR LR PUJARI AGP for Respondent No. 1, 2, 3

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CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 17/03/99

ORAL JUDGEMENT

The petitioner, through this writ petition under Article 226 of the Constitution of India, has challenged the order of detention dated 4.8.1998 passed by the Commissioner of Police, Vadodara City under section 3(2) of the Gujarat Prevention of Anti Social Activities Act, 1985 ("the PASA" for short) and has prayed for quashing of the said order and also for his immediate release from illegal detention.

2. From the grounds of detention, it seems that

because of registration of four cases under the Bombay Prohibition Act against the petitioner and also from the statements of three confidential witnesses that the detaining authority was subjectively satisfied that the petitioner is a bootlegger and his activities were prejudicial for maintenance of public order. Alternative remedies were also considered by the detaining authority who found that preventive detention was the only efficacious remedy on the facts and circumstances of the case against the petitioner. Accordingly, impugned order of detention was passed.

3. The impugned order of detention has been challenged by the learned counsel for the petitioner in the course of arguments on three counts. One of the contentions has been that the impugned order of detention suffers from the vice of non-application of mind by the detaining authority. This contention has no substance. The contention has been that the detaining authority has mechanically mentioned that if the proceedings for cancellation of bail are taken, it would be time consuming and in the mean time, the petitioner would continue his bootlegging activities which in turn would affect the maintenance of public order. It was urged by the learned counsel for the petitioner that out of four registered offences against the petitioner, one was registered in the year 1997 and three in the year 1998 and in none of the cases, application for cancellation of bail has been moved till the date of passing of the order of detention. Consequently, it was urged that the observation of the detaining authority that the proceedings for cancellation of bail will be time consuming was nothing but mechanical observation which has rendered the impugned order invalid. The detaining authority has made these observations while considering the alternative remedies. The impugned order of detention was passed on 4.8.1998. It seems that the detaining authority has considered that if on 4.8.1998, or thereafter, proceedings for cancellation of bail are taken up, the same would be time consuming. Consequently, it cannot be said that the detention order suffers from the vice of non application of mind. If the detaining authority considered alternative efficacious remedies, this Court, in exercise of its jurisdiction under Article 226 of the Constitution of India, cannot observe that the detaining authority was not justified in considering the alternative remedies. That would actually amount to exercising the appellate jurisdiction which is not conferred on this court in exercise of extraordinary powers under Article 226 of the Constitution of India.

The next contention has been that the delay in passing the impugned order of detention has rendered the detention order invalid. This contention has also no substance. The detention order was not passed immediately after registration of last offence in the year 1998. The detaining authority also considered the statements of three confidential witnesses. The first confidential witness has stated about the incident dated 5.5.1998. The other witness stated about the incident dated 25.5.1998 and the last witness has stated about the incident dated 17.6.1998. After recording the statements, the sponsoring authority would have prepared report and would have submitted the same before the detaining authority. It would have taken the some time. It is not the case where there was delay on the part of the sponsoring authority in submitting his report nor there was any delay on the part of the detaining authority in passing the detention order. If the order of detention was passed after one month and 17 days, from 17.6.1998, it cannot be said to be inordinate delay in passing the detention order. On this count also, the impugned order of detention cannot be struck down.

The last contention has been that the activities of the petitioner were not prejudicial for maintenance of public order, hence the detention order is invalid. The subjective satisfaction of the detaining authority that the petitioner is a bootlegger is not challenged by the learned counsel for the petitioner. The registration of four cases under the Bombay Prohibition Act and the statements of three confidential witnesses gave enough material to the detaining authority to reach subjective satisfaction that the petitioner was indulged in bootlegging activity within the meaning of section 2(b) of the PASA.

Learned counsel for the petitioner contended that the activities of the petitioner were not prejudicial for maintenance of public order. This contention was challenged by the learned Assistant Government Pleader. He relied upon the division bench verdict of this Court in the case of Popat Mohan versus State reported in 1989 (1) GLR 412 and contended that the sale of country made liquor in public area by the detenu was considered to be the activity prejudicial for maintenance of public order within the extended meaning of the term 'public order' as contained in explanation to section 3(4) of the PASA. I have gone through this judgment. The judgment is distinguishable on facts. In that case, it was shown that the country made liquor was being sold in open

locality mainly occupied by poor and down trodden persons of the locality. That situation was considered and it was observed that the sale of wine in such locality amounts to creating situation prejudicial for maintenance of public order. On facts, this is not the situation in the case under consideration before me. Neither from paragraph 2 nor from paragraph 1 of the grounds of detention, it follows that the petitioner was selling country made liquor in public through his gang. On the other hand, from paragraph 2 of the grounds of detention, it is clear that the petitioner was storing his stock of liquor in dirty drainage near Navi Dharti Golvad and was supplying the same to the persons doing that business in the locality. Thus, this is the distinguishing feature. The petitioner was not selling the country made liquor to the residents of the locality but he was selling and supplying the same to other bootleggers who were engaged in such activities. The other distinguishing feature is that on the strength of the pronouncement of the apex Court's in the case of Piyush Kantilal Mehta versus Commissioner of Police reported in AIR 1989 SC 491, it can safely be said that the petitioner may be a bootlegger within the meaning of section 2(b) of the Act but merely because of his being bootlegger, he cannot be preventively detained under the provisions of the PASA Act unless as laid down in subsection (4) of section 3 of the Act, his activities as such affect adversely or are likely to affect adversely the maintenance of public order. For this, paragraph 18 of the judgment of the apex Court can safely be cited. It, therefore, implies that the apex Court has not approved the view that mere sale of country made liquor would be prejudicial for maintenance of public order.

The material before the detaining authority for reaching the subjective satisfaction was in the first instance the registration of four offences under the Bombay Prohibition Act. From the grounds of detention, it is not indicated that on these four occasions, the petitioner created any situation or obstructed in the process of arrest, search and seizure or he created any situation prejudicial for maintenance of public order. If the petitioner on four occasions was booked under relevant sections of the Bombay Prohibition Act, it was nothing but violation of the provisions of the Bombay Prohibition Act and for such violation and breach of the provisions of the Bombay Prohibition Act, he was sufficiently dealt with under the ordinary law namely under the Bombay Prohibition Act. It was, therefore, not a case where the petitioner created any situation prejudicial for maintenance of public order on these four

occasions.

The other material before the detaining authority was the statements of three secret witnesses. The first witness stated about the incident dated 5.5.1998 at 4.00 p.m. The petitioner was passing on his scooter and seeing the witness, asked him to accompany. Since the petitioner was doing liquor business, the witness who was aware of such activities of the petitioner, refused to oblige him. Consequently, he was beaten by kicks and fists and was thrown on the ground. The witness shouted for help. Persons from nearby locality collected and thereupon, the petitioner took out Gupti concealed in his leg and inflicted blows on the witness and rushed to attack the witness and the people who had collected there. Atmosphere of fear and terror was created. It is not stated by the witness that any member of public was injured by the petitioner. If at all the witness was beaten and injury was caused by Gupti to him, the situation did not go beyond the situation prejudicial for maintenance of law and order. When such incident took place, some amount of commotion was likely to take place and such commotion, per se, cannot tantamount to creating any sense of insecurity, alarm or fear to life and property within the extended meaning of the disturbance of public order. Thus, the statement given by this witness was hardly sufficient for reaching subjective satisfaction that the activities of the petitioner on that account were prejudicial for maintenance of public order.

The second witness stated about the incident of 25th May, 1998 which took place at 2.00 p.m. The witness on the suspicion that he was police informer, was given first blows by the petitioner and was pushed down. People gathered to save the witness. The petitioner abused those people and took out Rampuri knife and rushed towards them for inflicting injuries. But no injury was caused by knife to the witness or the persons who collected on the spot. As such, this incident can not be said to have created situation prejudicial for maintenance of public order.

The third witness has stated about the incident of 17th June, 1998 at 1.45 p.m. The witness was going on auto rickshaw. The petitioner was standing on the way. He stopped the witness and asked him to carry certain quantity of liquor belonging to him in his auto rickshaw. The witness declined. The matter ended there. On the same day, at about 6.30 p.m., the petitioner saw the witness near Road Nala and abused him for not carrying

his liquor and he was given threat. There appears some inaccuracy in english translation of the gist of statement of this witness. As per english version of the gist of statement of this witness, the petitioner inflicted knife blows to the witness as well as to the persons who collected to save the witness but from verification of the statement of this witness from original, nothing of the sort was found that any injury was caused by knife either to the witness or to the persons who gathered there to save the witness. The only thing in the statement of the witness is that the witness and the persons who collected at the spot were chased by the petitioner showing Gupti and knife. This statement also cannot be said to be the material on which subjective satisfaction about the activity being prejudicial for maintenance of public order could safely be reached.

Thus, after considering the entire material on record, it can safely be said that the activities of the petitioner were not prejudicial for maintenance of public order. The impugned order of detention has, therefore, been rendered illegal and invalid. It has, therefore, to be quashed.

In the result, this petition succeeds and is hereby allowed. The impugned order of detention dated 4.8.1998 (Annexure "A" to the petition) is hereby quashed. The petitioner shall be released forthwith unless wanted in some other case.

Dt.17.3.1999. (D.C.Srivastava,J.)

Vyas